Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KATHLEEN SEMIEN,

Petitioner,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA, a CIGNA COMPANY, and BP LONG TERM DISABILITY (LTD) PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Article III powers of a district court in adjudicating a civil action brought pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) are limited to conducting a review proceeding?

LIST OF PARTIES

The parties to this action are all listed in the caption: Kathleen Semien, plaintiff; Life Insurance Company of North America, a CIGNA company, administrator and payor of benefits, defendant; and BP Long Term Disability (LTD) Plan, plan sponsor, defendant.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS, COURT RULES INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR ALLOWANCE OF THE WRIT 10

I. The Semien Ruling Conflicts With the ERISA .Statute, Prior Rulings of the Supreme Court, and Rulings Issued By Other Courts of Appeals 10

A. The *Semien* Ruling Conflicts with the ERISA Statute's Creation of Civil Actions as Well as This Court's Recognition that Civil Actions are Not "Review Proceedings" Absent Explicit Statutory Direction 10

1. The Language of the ERISA Statute Precludes Characterization of ERISA Civil Actions As Review Proceedings..... 10

2. The Seventh Circuit's Conclusion that a District Court's Article III Powers Are Limited Under ERISA Is Contrary to ERISA's Legislative History.....12

B. The *Semien* Ruling Conflicts with Rulings Issued by Other Circuits.....18

II. The Semien Ruling Creates A Quasi-Administrative Law Lacking the Protections of Administrative Claim Determinations.....21

III. The Semien Ruling Disregards The Societal Importance of Employee Benefits.....24

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

Antram v. Stuyvesant Life Insur.Co., 287 So.2d 837 (Ala. 1973)..... 15

Barnett v. Ross, 333 Pa. 510, 3 A.2d 923 (Pa. 1939)..... 16

Beam v. Intl. Org. of Masters, Mates and Pilots, 511 F.2d 975, 980 (2d Cir. 1975)..... 14

Bedrick v. Travelers Insur.Co., 93 F.3d 149 (4th Cir. 1996)..... 19

Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003)..... 18, 23

Calvert v. Firstar Finance, Inc., 409 F.3d 286 (6th Cir. 2005)..... 18

Chandler v. Roudebush, 425 U.S. 840 (1976)..... 10-11

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990)..... 13

Cox v. Washington Natl. Insur.Co., 520 S.W.2d 76 (Ct.App.Mo. 1974)..... 15

Farley v. Arkansas Blue Cross & Blue Shield, 147 F.3d 774 (8th Cir. 1998)..... 19

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)..... 5,6, 14, 15

Herzberger v. Standard Insur.Co., 205 F.3d 327 (7th Cir. 2001)..... 22

Kergosien v. Ocean Energy, Inc., 390 F.3d 346 (5th Cir. 2004)..... 19

Liston v. Unum Corp. Officer Severance Plan, 330 F.3d 19 (1st Cir. 2003)..... 19

Massachusetts Mutual Life Insur.Co. v. Russell, 473 U.S. 134 (1985)..... 14

Matthews v. Swift & Co., 465 F.2d 814 (5th Cir. 1972)..... 16

McDonald v. Western-Southern Life Ins. Co., 347 F.3d 161 (6th Cir. 2003)..... 16-17

Miller v. United Welfare Fund, 72 F.3d 1066 (2d Cir. 1995)..... 20

Moon v. American Home Assur.Co., 888 F.2d 86 (11th Cir. 1989)..... 19

Motor Vehicle Mfr. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983)..... 16

Nagele v. Electronic Data Sys. Corp., 193 F.R.D. 94 (W.D.N.Y. 2000)..... 20

New Hampshire Fire Ins.Co. v. Scanlon, 362 U.S. 404 (1960)..... 17

Perlman v. Swiss Bank Corp., 195 F.3d 975 (7th Cir. 1999)..... 6, 22

Phelps Dodge Corp. v. Brown, 112 Ariz. 179, 540 P.2d 651 (1975)..... 16

Pinto v. Reliance Standard Life Insur.Co., 214 F.3d 377 (3d Cir. 2000) 19

Radford Trust v. Unum Life Insur.Co. of America, 321 F.Supp.2d 226 (D.Mass. 2004) 24

Richardson v. Perales, 402 U.S. 389 (1971) 21, 23

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) 14

Semien v. Life Insurance Co. of North America, 436 F.3d 805 (7th Cir. 2006) 1

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 13

Tremain v. Bell Industries, 196 F.3d 970 (9th Cir. 1999) 19

Van Boxel v. Journal Co. Employees Pension Trust, 836 F.2d 1048 (7th Cir. 1987) 22

Zervos v. Verizon N.Y., Inc., 252 F.3d 163 (2d Cir. 2001) .. 19

Statutes

29 U.S.C. § 1001(b) (2006) 5, 24

29 U.S.C. § 1104(a)(1) (2006) 21

29 U.S.C. § 1132(a)(1)(B) (2006) ..... i, 5, 8, 10, 12

29 U.S.C. § 1133 (2006) 5, 13, 14

42 U.S.C. § 423(d)(1)(A) (2006) 7

Other Authorities

Brief of Solicitor General in *Firestone Tire & Rubber Co. v. Bruch,* 1987 U.S. Briefs 1054 15

Gosselin, "The Safety Net She Believed in Was Pulled Away When She Fell" *Los Angeles Times* (August 21, 2005) ..24

H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974)..... 12, 13

J. Wooten, *The Employee Retirement Income Security Act of 1974 – A Political History* (U.Cal. Press 2005) 24

Mariner, "What Recourse? – Liability for Managed-Care Decisions and the Employee Retirement Income Security Act," *New England Journal of Medicine* 343: 592, 595 (August 24, 2000)..... 25

S.Rep. 93-383, reprinted in 1974 U.S. Code Cong. & Admin. News 5000..... 12

Schultz, "A Hobbled Star Battles the NFL" *Wall Street Journal* (December 3, 2005)..... 25

www.efmoody.com/insurance/disabilitystatistics.html..... 24

www.massmutual.com/ mmfg/service/di/whygetdi.html ...24

www.ssa.gov/OACT/STATS/dibStat.html..... 24

Rules

Federal Rule of Civil Procedure 1 ..... 15, 17

Federal Rule of Civil Procedure 26(a)(2)(B)..... 19

Federal Rule of Civil Procedure 26(b)(1) 19

Federal Rule of Civil Procedure 56 23

Federal Rule of Evidence 802 23

Regulations

29 C.F.R. § 2560.503-1 (2006) 5, 13

29 C.F.R. § 2570.11 (2006) 13

29 C.F.R. § 2570.7 (2006) 13

29 C.F.R. §§ 2560.502i-1 (2006) 13

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Semien v. Life Insurance Co. of North America,* 436 F.3d 805 (7th Cir. 2006)(Reprinted at Appendix 1a-19a). The Court of Appeals affirmed two rulings issued by the United States District Court for the Northern District of Illinois on April 20, 2004 (Appendix 29a-33a) and on October 7, 2004 (Appendix 20a-28a), denying leave to take discovery and granting defendant summary judgment, respectively. Neither of the district court's orders was published.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The initial subject matter jurisdiction was based on 29 U.S.C. §§ 1132(e)(1) and (f), and 28 U.S.C. § 1331, as this matter arose under the Employee Retirement Income Security Act, a federal law.

The Seventh Circuit's opinion was issued on February 6, 2006. No rehearing was sought.

CONSTITUTIONAL AND STATUTORY PROVISIONS, COURT RULES INVOLVED

Article III, Section 2 of the United States Constitution states in relevant part:

> The Judicial Power shall extend to all Cases, In Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made…

Title 29, United States Code, Section 1001(b) states:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

Title 29, United States Code, Section 1132(a) states:

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

Title 29, United States Code, Sections 1132(e)(1) and (f) state:

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title

brought by the Secretary or by a participant, beneficiary, fiduciary…

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Federal Rules of Civil Procedure 1 and 2 state in relevant part:

Rule 1. Scope and Purpose of Rules.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81…

Rule 2. One Form of Action.

There shall be one form of action to be known as "civil action."

Federal Rule of Civil Procedure 26(a)(2)(B) states in relevant part:

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert

testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Federal Rule of Civil Procedure 26(b)(1) states in relevant part:

Parties may obtain discovery regarding any matter, not privileged that is relevant to the claim or defense of any party…

Federal Rule of Civil Procedure 56(c) states in relevant part:

[Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Federal Rule of Civil Procedure 56(e) states in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Federal Rule of Evidence 802 states:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

STATEMENT OF THE CASE

1. Employees who have been denied benefits under an employee benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, are entitled to receive a full and fair review of the benefit denial conducted by the plan fiduciary. 29 U.S.C. § 1133(2) (2006); 29 C.F.R. § 2560.503-1 (2006).

2. If the benefit remains denied following the claim review, the employee may file a civil action to recover benefits due under the plan. 29 U.S.C. § 1132(a)(1)(B) (2006). A stated policy of the ERISA law is to provide ready access to the federal courts. 29 U.S.C. § 1001(b).

3. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court held that Congress authorized plenary review of benefit denials, although the Court also ruled that ERISA did not prohibit benefit plans from

including plan language that would trigger a deferential standard of review.

4. One question left open by *Firestone,* regardless of the standard of review applied, was whether civil actions authorized by ERISA were to be plenary proceedings governed by the Federal Rules of Civil Procedure or limited solely to a review of a claim record as a court would decide an administrative law claim. This case squarely presents that question.

5. Both the district court and the court of appeals viewed Semien's civil action challenging the termination of her disability benefits as a review proceeding under an administrative law framework. The district court stated, "Since *Perlman [v. Swiss Bank Corp. Comprehensive Disability Protection Plan,* 195 F.3d 975 (7th Cir. 1999], courts in this district have refused to allow discovery on or to supplement the administrative record with material other than what a beneficiary submitted to a plan in support of his or her claim for benefits." Pet.App.33a. The stated rationale for that finding was the court's belief that "deferential review of an administrative decision means review on an administrative record." Pet.App.32a (citing *Perlman,* 195 F.3d at 981-82 (7th Cir. 1999)).

The court of appeals affirmed, stating as a premise that a civil action brought under the ERISA statute is a "review proceeding." Pet.App. 18a. The court derived that conclusion from its finding that "ERISA provides a limited Article III review." (Pet.App. 13a)

6. Kathleen Semien, a 54 year old chemical engineer and environmental specialist who worked for BP Amoco for more than ten years, became disabled in May 2000 due to a liver disorder and degenerative spinal

impairments. Her doctors certified her inability to work due to those medical conditions; and Semien began receiving long-term disability payments under a benefit plan sponsored by her employer. The benefits were both insured and administered by the Life Insurance Company of North America (LINA), a CIGNA company. In addition to insurance benefits, Semien also qualified to receive Social Security disability benefits which signified her inability to engage in "any substantial gainful activity." 42 U.S.C. § 423(d)(1)(A) (2006) (definition of "disabled" under Social Security Act).

Although Semien received treatment for her liver condition, and underwent surgery in January 2002 to fuse the vertebrae in her lower back, by October 2002, Semien's overall condition substantially worsened. Her doctors diagnosed bone spurs and stenosis of the cervical spine which resulted in such severe pain that narcotic medication had to be prescribed. Pet.App. 3a, 22a, 23a. In addition, over the course of her disability, and as a consequence of her chronic illnesses, psychiatric complications developed, leaving Semien so severely depressed that she actively contemplated suicide. Although Semien expressed a strong desire to return to work, when queried by BP Amoco's medical staff, Semien's primary care physician, neurosurgeon, psychiatrist, and psychologist all reported that anticipated restrictions and limitations from pain, fatigue, depression, and stress intolerance would prevent her from sustaining work activity. Pet.App.23a. Consequently, BP Amoco found Semien incapable of returning to work. Pet.App.23a.

Despite LINA's initial determination that Semien qualified for benefits, in October 2002, the insurer terminated Petitioner's payments, contending she was capable of working. When Semien sought a review, LINA

retained Eddie Sassoon, M.D. to review the medical records and furnish an opinion as to whether Semien could work. In a short, conclusory report that ignored the cervical spine impairment as well as the psychiatric issues, Dr. Sassoon corroborated LINA's initial conclusion, although even the Court of Appeals acknowledged, "it was unclear...exactly what information he reviewed" (Pet.App. 5a). LINA also retained a psychiatrist, Jack Greener, M.D., to review Semien's medical records; and without considering her physical impairments, he found her capable of performing a sedentary occupation. Pet.App. 5a.

Based on its consultants' reports, and in the absence of a medical examination or even direct consultation with Semien's physicians, LINA upheld its determination. Semien then filed suit pursuant to 29 U.S.C. § 1132(a)(1)(B) (2006) seeking restoration of her benefits. Because she had no opportunity during the pre-suit appeal to cross-examine LINA's consultants, Petitioner requested limited discovery to investigate any financial bias and other prejudicial relationships that might exist between LINA and the consultants it retained. LINA refused to permit the discovery, though; and the district court denied Semien's request to compel discovery on the ground that ERISA proceedings proscribe discovery. Pet.App. 29a-33a.

Subsequently, on October 7, 2004, despite the court's acknowledgement that the evidence establishing Semien's disability could have supported a judgment in her favor (Pet.App.27a), the court ignored the conflict in the evidence and granted summary judgment to the defendants. Pet.App.20a-28a. Without giving the Petitioner the opportunity to investigate bias or other potential flaws in the claims process, the court credited the insurer's consultants' reports as substantial evidence sufficient to uphold the benefit termination under an arbitrary and capricious

standard of court review. Pet.App. 20a-28a. Petitioner filed a timely notice of appeal on October 14, 2004.

The Seventh Circuit affirmed the district court's ruling in all respects in a decision issued on February 6, 2006. Pet.App. 1a-19a. While accepting that Semien's evidence provided "rational" support for a contrary conclusion, the court nonetheless found no reason to allow Petitioner any means to present a challenge to the reports prepared by LINA's consultants. Pet.App. 9a. As its rationale, the Court of Appeals applied an administrative law paradigm, deeming the adjudication of ERISA civil actions as "review proceedings" and expressing a concern that "Congress has not provided Article III courts with the statutory authority, nor the judicial resources, to engage in a full review of the motivations behind every plan administrator's discretionary decisions." Pet.App.18a.

Both the paradigm applied, and the ruling of the Seventh Circuit, conflict with the language of the ERISA statute, its legislative history, and with rulings issued by this Court and by the First, Second, Third, Fifth, Sixth, Eighth, Ninth and Eleventh Circuit Courts of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

I. *The Semien Ruling Conflicts With the ERISA Statute, Prior Rulings of the Supreme Court, and Rulings Issued By Other Courts of Appeals*

A. The *Semien* Ruling Conflicts with the ERISA Statute's Creation of Civil Actions as Well as This Court's Recognition that Civil Actions are Not "Review Proceedings" Absent Explicit Statutory Direction

1. The Language of the ERISA Statute Precludes Characterization of ERISA Civil Actions As Review Proceedings

Civil actions authorized by § 502 of the Employee Retirement Income Security Act are not "review proceedings" of a claim record as the Seventh Circuit ruled. Pet.App. 18a. Congress' authorization of a "civil action...to recover benefits due ... under the terms of [a] plan" (29 U.S.C. § 1132(a)(1)(B) (2006)) entitles plan participants to a plenary court proceeding rather than a claim record review under the principles enunciated in *Chandler v. Roudebush,* 425 U.S. 840 (1976).

In *Chandler,* the identical issue arose with respect to employees bringing civil actions to redress discrimination in federal employment pursuant to § 717(c) of the Civil Rights Act, 42 U.S.C. §2000e *et seq.*. While some lower courts had ruled that such actions involved a review of the record made at prior administrative proceedings, this Court overruled those decisions and held that federal employees were entitled to discovery and a trial rather than a review proceeding, explaining: "Nothing in the legislative history indicates that the federal-sector "civil action" was to have this chameleon-like character, providing fragmentary de novo consideration

of discrimination claims where "appropriate," ibid., and otherwise providing record review." 425 U.S. at 861. The Court added,

> In most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like "substantial evidence," which has "become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." Ibid. E. g., 5 U.S.C. § 706 (scope-of-review provision of Administrative Procedure Act); 12 U.S.C. § 1848 (scope-of-review provision applicable to certain orders of the Board of Governors of the Federal Reserve System); 15 U.S.C. § 21 (c) (scope-of-review provision applicable to certain orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, and the Federal Trade Commission); 21 U.S.C. § 371 (f)(3) (scope-of-review provision applicable to certain orders of the Secretary of Health, Education, and Welfare).

425 U.S. at 862 n.37.

Applying *Chandler's* analysis, it is evident that nowhere in the statute itself or in the legislative history of the ERISA law is the term "substantial evidence" used; nor is there any support for a conclusion that Congress intended ERISA civil actions would be review proceedings.

2. The Seventh Circuit's Conclusion that a District Court's Article III Powers Are Limited Under ERISA Is Contrary to ERISA's Legislative History

The previous argument is reinforced by ERISA's legislative history which is completely contrary to the Seventh Circuit's conclusion that the federal courts' Article III powers are limited in deciding ERISA benefit disputes. While the *Semien* opinion cites a purported Congressional intent that ERISA provide "a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously," (Pet.App. 18a), the citation for that comment can be traced to Senate Report 93-383 accompanying S.1179, a predecessor to the bill that eventually became the ERISA law. The draft bill afforded pension claimants the opportunity to pursue a grievance or arbitration proceeding before the Secretary of Labor; and the report refers to such a proceeding as providing "the opportunity to resolve any controversy over [ ] retirement benefits under qualified plans in an inexpensive and expeditious manner...Accordingly, the committee has decided to provide that controversies as to retirement benefits are to be heard by the Department of Labor." S.Rep. 93-383, reprinted in 1974 U.S. Code Cong. & Admin. News 5000.

That provision was dropped from the final bill, though; and nowhere in the ERISA statute is there any provision limiting the manner in which the courts are to resolve civil actions brought by welfare plan participants pursuant to 29 U.S.C. §1132(a). On the contrary, the Conference Report explained that ERISA civil actions "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep.

93-1280, 93d Cong., 2d Sess. 327 (1974). According to *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957), Section 301 (29 U.S.C. §185) requires the federal courts to "fashion from the policy of our national labor laws" a federal common law governing the interpretation of collective bargaining agreements which includes plenary proceedings that even encompass trials before juries. *See, Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558 (1990).

The statutory history of 29 U.S.C. § 1133 further supports a conclusion that the absence of an evidentiary hearing or even an arbitral forum prior to suit mandates plenary procedures. According to the House Conference Report, § 1133 was included as a compromise between the original House Bill, which had no such provision and the Senate Bill, which provided for review and arbitration of benefit disputes. H.R.Rep.No.93-1280, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Ad.News 5038, 5108. Further, the absence of an administrative hearing or discovery proceedings from the claim regulations applicable to 29 U.S.C. § 1133, 29 C.F.R. §2560.503-1, underscores the need for plenary proceedings for plan participants who initiate civil actions to redress benefit claim denials.

In contrast to the benefit claim regulations, other ERISA regulations create an administrative process for adjudicating prohibited transaction penalties, with discovery procedures and an explicit statement that ensuing civil actions are review proceedings. *Compare* 29 C.F.R. §§ 2560.502i-1, 2570.7, and 2570.11. In the absence of any comparable process for claim appeals, though, there is no basis for adjudicating ERISA benefit suits as review proceedings; and the plenary procedures afforded by the Federal Rules of Civil Procedure are to be accorded plan participants seeking relief under 29 U.S.C. §1132(a)(1)(B).

Although the Court has never ruled on this precise issue, it has acknowledged Congress' intent to provide plenary proceedings under the ERISA law rather than having the court review a claim record that amounts to little more than unsworn hearsay evidence. In *Massachusetts Mutual Life Insur.Co. v. Russell,* 473 U.S. 134, 144 (1985), the Court explained that the statutory provision authorizing a civil action under the ERISA law, 29 U.S.C. § 1132(a)(1)(B), "enables a claimant to bring a civil action to have the merits of his application determined, just as he may bring an action to challenge an outright denial of benefits." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989) further dispels any basis for interpreting the ERISA statute in a manner that prohibits plenary proceedings: "Unlike the LMRA[1] [29 U.S.C. § 186(c)(2) 2006], ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans. 29 U.S.C. §§ 1132(a), 1132(f)."

Moreover, the Court has cautioned against deeming pre-litigation claim appeals a substitute for plenary proceedings. In *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 385 (2002), the Court found:

> [ERISA] requires plans to afford a beneficiary some mechanism for internal review of a

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[1] Cases such as *Beam v. Intl. Org. of Masters, Mates and Pilots,* 511 F.2d 975, 980 (2d Cir. 1975) had characterized LMRA proceedings as seeking review of Trustees determinations after pointing out that "review in this case is not the examination of a dispute between an insurance company with a boilerplate contract on one hand and a consumer on the other." In contrast, that is exactly what occurred here; and unlike benefit trusts established under the LMRA where both management and the employees appoint trustees, the decisionmaker here was an insurance company, further supporting this Court's distinction between claims under the LMRA and ERISA claims.

> benefit denial, 29 U.S.C. § 1133(2), and provides a right to a subsequent judicial forum for a claim to recover benefits, § 1132(a)(1)(B). Whatever the standards for reviewing benefit denials may be, they cannot conflict with anything in the text of the statute, which we have read to require a uniform judicial regime of categories of relief and standards of primary conduct, *not a uniformly lenient regime of reviewing benefit determinations.* (citation omitted)(emphasis added).

Thus, while expeditious and inexpensive litigation is the desired goal of all civil procedure (*See,* Fed.R.Civ.P. 1), *Semien's* reliance on a supposed Congressional intent to curtail the civil procedure accorded ERISA proceedings deviates from the statute. Neither the statutory language nor ERISA's legislative history provides support for the Seventh Circuit's conclusion that a district court's Article III powers are limited under ERISA. Pet.App. 18a. Congress created a civil action for plan participants with the intent that the law not afford "less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 114 (1989).[2]

Before ERISA, federal courts applied contract law to resolve employee benefits disputes. See Brief of Solicitor General in *Firestone*, 1987 U.S. Briefs 1054, at 5 n.7. Unquestionably, the dispute here arose over an insurance contract, and would have been resolved through plenary court proceedings notwithstanding the ERISA law. *See, e.g.,*

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[2] *Firestone* also dismissed an argument that considerations relating to the cost of litigation are grounds for limiting court review (489 U.S. at 115), further undermining the Seventh Circuit's rationale.

Cox v. Washington Natl. Insur.Co., 520 S.W.2d 76 (Ct.App.Mo. 1974)(employer sponsored disability benefit claim accorded plenary civil procedure); *Antram v. Stuyvesant Life Insur.Co.*, 287 So.2d 837 (Ala. 1973)(same).

Moreover, even under the common law of trusts, which underpins much of the ERISA statute according to *Firestone*, plenary proceedings were the norm prior to ERISA. *See, e.g., Barnett v. Ross,* 333 Pa. 510, 3 A.2d 923, 925 (Pa. 1939) (in an action for breach of implied trust by fiduciary, plaintiff beneficiary may seek a bill of discovery in equity to support a claim of existence of trust and misconduct of alleged trustee); *Phelps Dodge Corp. v. Brown,* 112 Ariz. 179, 540 P.2d 651 (1975)(jury trial conducted); *Matthews v. Swift & Co.*, 465 F.2d 814 (5th Cir. 1972)(plenary bench trial of pension and disability claim despite arbitrary and capricious standard of review).

Although this Court ruled in *Firestone* that federal courts are to determine employee benefit claims brought under the ERISA law pursuant to a plenary standard of review unless the plan stipulates for a more deferential standard, neither that ruling, nor any other Supreme Court decision limits the scope of civil procedures available under ERISA. What the *Semien* case appears to have misperceived is a distinction between a plenary proceeding and a *de novo* standard of court review. Even under an arbitrary and capricious standard of review, such as the one applied by the district court and by the Court of Appeals in this case, a court must examine in the first instance whether the decision-maker "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence." *Motor Vehicle Mfr. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Likewise, in *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 172-173 (6th Cir. 2003), the Sixth Circuit

explained that when a court reviews an ERISA plan administrator's decision, the determination of whether a plan administrator's decision is arbitrary and capricious

> inherently includes some review of the quality and quantity of the medical evidence and the opinions on both sides of the issues. Otherwise, courts would be rendered to nothing more than rubber stamps for any plan administrator's decision as long as the plan was able to find a single piece of evidence-no matter how obscure or untrustworthy-to support a denial of a claim for ERISA benefits. (citation omitted)

Consequently, a showing of whether a plan administrator's determination is arbitrary and capricious requires that the claimant be afforded the same tools as any other litigant bringing a civil action in the district court, contrary to the Seventh Circuit's deprivation of the discovery Petitioner sought. Rule 1 of the Federal Rules of Civil Procedure mandates applicability of the Rules to all civil actions other than those enumerated in Rule 81, with no exception made for ERISA cases. Indeed, in *New Hampshire Fire Ins.Co. v. Scanlon,* 362 U.S. 404, 406 (1960), this Court ruled that even in tax levies, plenary procedures are required. The Court explained:

> Summary trial of controversies over property and property rights is the exception in our method of administering justice. Supplementing the constitutional, statutory, and common-law requirements for the adjudication of cases or controversies, the Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and

> determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a civil nature, with certain exceptions stated in Rule 81 none of which is relevant here. Rule 2 directs that "There shall be one form of action to be known as 'civil action.'"

The Seventh Circuit's ruling, which exempts ERISA cases from the Federal Rules of Civil Procedure, is inconsistent with these principles.

B. The *Semien* Ruling Conflicts with Rulings Issued by Other Circuits

The Seventh Circuit's treatment of ERISA cases is also directly contrary to rulings issued by virtually every other Circuit. The Seventh Circuit has disregarded this Court's mandatory injunction in *Firestone* that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, "that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" 489 U.S. at 115 (citing Restatement (Second) of Trusts § 187, Comment d.)(emphasis added). Applying that directive, in *Calvert v. Firstar Finance, Inc.*, 409 F.3d 286, 292 (6th Cir. 2005), the Sixth Circuit expressed concern about consultants, such as the doctors identified in the *Semien* ruling, who are hired by insurers to review claims: "As the plan administrator, Liberty had a clear incentive to contract with individuals who were inclined to find in its favor that Calvert was not entitled to continued LTD benefits."[3] Consequently, the Sixth Circuit

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[3] This Court, too, expressed concern in *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 832 (2003) that "physicians repeatedly retained by benefits plans may have an incentive to make a finding of 'not disabled' in order to save their employers[']' money and preserve their own consulting arrangements." (citation omitted).

admonished that discovery would provide "a better feel for the weight to accord this conflict of interest." 409 F.3d at 293 n.2.

Similarly, the First Circuit allows discovery relating to corruption in the claim review process. *Liston v. Unum Corp. Officer Severance Plan,* 330 F.3d 19 (1st Cir. 2003). Conflict of interest discovery is also permitted in the Second Circuit (*Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir. 2001)); the Third Circuit (*Pinto v. Reliance Standard Life Insur.Co.*, 214 F.3d 377 (3d Cir. 2000)); the Fifth Circuit (*Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 356 (5th Cir. 2004) ("There is no practical way for the extent of the administrator's conflict of interest to be determined without the arbitrator going beyond the record of the administrator.")); the Eighth Circuit (*Farley v. Arkansas Blue Cross & Blue Shield,* 147 F.3d 774 (8th Cir. 1998)); the Ninth Circuit (*Tremain v. Bell Industries,* 196 F.3d 970 (9th Cir. 1999)); and the Eleventh Circuit (*Moon v. American Home Assur.Co.*, 888 F.2d 86 (11th Cir. 1989)).

However, the Seventh Circuit stands alone in restricting a claimant's ability to establish the arbitrariness of a plan administrator's determination. While the *Semien* ruling does not altogether disallow discovery, its approach of granting discovery in ERISA cases only if the insured can first produce credible evidence justifying discovery (Pet.App. 17a) applies circular reasoning in constraining discovery that would otherwise routinely fall within the scope of discovery permitted under Fed.R.Civ.P. 26(b)(1) and would involve the type of expert witness disclosure mandated by Rule 26(a)(2)(B) in order to reveal potential bias. A plan participant has no means of proving bias or establishing that a plan administrator's decision was arbitrary and capricious if denied the tools necessary to investigate the underlying basis of the determination.

The fruits of discovery in ERISA cases, when taken, have provided compelling evidence of arbitrary and capricious conduct and/or bias. For example, in *Bedrick v. Travelers Insur.Co.*, 93 F.3d 149 (4th Cir. 1996), discovery revealed the consultants whose opinions were relied on by a medical benefit plan in denying therapy for a child suffering from cerebral palsy lacked adequate qualifications. *Miller v. United Welfare Fund*, 72 F.3d 1066, 1072 (2d Cir. 1995) also relied on deposition testimony of the plan's administrator to find that none of the decisionmakers involved in denying a claimant's request for benefits understood the medical information in the claimant's file, thus leading to a conclusion that the benefit determination was arbitrary and capricious. Thus, as *Nagele v. Electronic Data Sys. Corp.*, 193 F.R.D. 94, 104 (W.D.N.Y. 2000) observed,

> as the arbitrary and capricious standard requires courts to scrutinize, although deferentially, decisions by plan fiduciaries for lack of reasonableness, including the absence of substantial evidence, such deficiencies in the administrative review function can be significantly illuminated through the reasonable exercise of standard discovery devices available in federal civil practice.

193 F.R.D. at 104.

Therefore, because the arbitrary and capricious standard of review is made more meaningful, rather than diminished, by allowing discovery, the disallowance of discovery in this case was an aberration and a departure from rulings issued by other Courts of Appeals.

II. *The Semien Ruling Creates A Quasi-Administrative Law Lacking the Protections of Administrative Claim Determinations*

Contrary to the framework established by the Federal Rules of Civil Procedure for the adjudication of civil actions, the *Semien* decision transforms the ERISA law into a quasi-administrative law devoid of the protections that comprise a fair administrative hearing. By simply reviewing the claim record rather than allowing for plenary procedures, the Seventh Circuit deprived Semien of rights she would have possessed had this case involved an administrative law proceeding, such as a Social Security disability claim.

The Court of Appeals' conclusion that the reviewing doctors' opinions "demonstrate a thorough consideration of the available information" (Pet. App. 12a), when the reports were controverted and no cross-examination was allowed, is in conflict with *Richardson v. Perales,* 402 U.S. 389, 402-406 (1971). *Perales,* which involved Social Security disability benefits, ruled that an examining physician's report may constitute substantial evidence in an *administrative proceeding* only when nine separately enumerated assurances of trustworthiness were met. None of those protections, which include the fact that the medical report was prepared by a percipient witness who had personally conducted a clinical, scientifically valid medical examination, and the claimant retained the opportunity to cross-examine the author of the report, were present in this case. Nor was Semien given any opportunity to have her claim adjudicated prior to suit by a body possessing the same neutrality and objectivity as an administrative agency, or even by an arbitrator.

Indeed, ERISA benefit adjudications performed by insurance companies are fundamentally different from Social Security disability claims because "the agency operates

essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." *Perales,* 402 U.S. at 403. Although the *Semien* ruling expressed an opinion that it had no cause to suspect bias by the insurer (Pet.App. 16a), the Respondent faces a perpetual conflict between its fiduciary duty to its shareholders and its fiduciary duty to plan participants mandated by § 404 of the ERISA statute (29 U.S.C. § 1104(a)(1) (2006)). Therefore, one of the major justifications for giving deference to an administrative agency, neutrality, is absent here. Yet the implication of what the Court of Appeals ruled in *Semien* means that claimants in ERISA benefit disputes are "effectively precluded as a matter of law any procedural challenge to an ERISA plan administrator's decisions, thereby giving those decisions a uniquely privileged position in the entire field of administrative or quasiadministrative law." *Perlman v. Swiss Bank Corp.,* 195 F.3d 975, 983 (7th Cir. 1999)(Wood, J., dissenting).

Semien's application of an administrative law paradigm of judicial review has also been rejected by several Courts of Appeals including other panels within the Seventh Circuit. In *Herzberger v. Standard Insur.Co.,* 205 F.3d 327 (7th Cir. 2001), the court reiterated the point expressed earlier in *Van Boxel v. Journal Co. Employees Pension Trust,* 836 F.2d 1048, 1050 (7th Cir. 1987) that "Pension fund trusts are not administrative agencies," nor are they "policy makers; they are interpreters of contractual entitlements." *Herzberger* added that the courts have drawn a mistaken analogy between ERISA-governed disability benefit claims and Social Security claims by pointing out that the "Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge." 205 F.3d at 332. The Eleventh Circuit has also issued a stern caution against

importing "administrative agency concepts into the review of ERISA fiduciary decisions." *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1564 n. 7 (quoting *Van Boxel*) (11th Cir. 1990). Yet despite these warnings, the *Semien* ruling improperly relies on an administrative law framework.

This Court has also questioned the evidentiary weight to be given to medical reports used in ERISA claims. *Black & Decker Disability Plan v. Nord,* 538 U.S. 822 (2003) ruled that while an ERISA plan administrator need not give special deference to the opinions of treating doctors in disability benefit disputes, plan administrators were still required to base their findings on "reliable evidence." 538 U.S. at 834. In *Nord,* the treating physician's opinion was controverted by an independent examining doctor. However, in this case, the consultants on which the plan administrator relied had never examined the claimant, and as the Seventh Circuit acknowledged, it was not even clear what evidence the consultants had reviewed. Pet.App. 12a. Thus, for a court to credit those consultants' findings over the treating doctors' reports, without allowing any inquiry into the reliability of the findings made, is contrary both to *Nord* and *Perales.* In order to assess whether the plan administrator's evidence is "reliable," as *Nord* requires, claimants must have the opportunity to conduct appropriate discovery and be accorded a plenary hearing.

In sum, the Petitioner was denied the protection of Rule 56 of the Federal Rules of Civil Procedure and Federal Rule of Evidence 802's prohibition against hearsay evidence. Summary judgment may only be entered when based on admissible evidence according to Fed.R.Civ.P. 56(e). Because there was no guarantee that the evidence on which the plan denial was based was admissible or even "reliable," both *Nord* and *Perales* reveal the flaw in the regime the

Seventh Circuit has created for the adjudication of ERISA disputes.

III. *The Semien Ruling Disregards The Societal Importance of Employee Benefits*

The decision issued by the Court of Appeals finding that "ERISA provides a limited Article III review" (Pet.App. 13a) disregards the societal importance of employee benefits. Surely, the preamble to the ERISA statute (29 U.S.C. § 1001(b) (2006)), which speaks of protecting plan participants and assuring adequate remedies and access to federal court, makes it clear Congress intended that protection of the disabled deserves the full attention of Article III courts. Insurance company statistics show that "one out of five 35-year-olds will experience a disability that lasts three months or more before age 65." www.massmutual.com/mmfg/service/di/whygetdi.html. Working women are even more adversely affected and are deemed "three times more likely than men to miss work due to a disability related illness." www.efmoody.com/insurance/disabilitystatistics.html. According to the Social Security Administration, more than 2.1 million individuals applied for Social Security disability insurance in 2005, a 4.39% increase over the prior year. www.ssa.gov/OACT/STATS/dibStat.html.

Other statistics reveal that approximately 50 million Americans who work in the private sector participate in retirement plans regulated by ERISA. Life, health and disability plans cover even more people. J. Wooten, *The Employee Retirement Income Security Act of 1974 – A Political History* 2 (U.Cal. Press 2005). Consequently, "decisions whether and how to ensure that disability does not lead to poverty are obviously of great societal importance." *Radford Trust v. Unum Life Insur.Co. of America,* 321 F.Supp.2d 226, 240 (D.Mass. 2004). The media has also

begun focusing on ERISA and the need for more penetrating judicial review. The story of how a law intended to protect employee benefits has been used to shield disability insurers was told in the *Los Angeles Times* by reporter Peter G. Gosselin in his article, "The Safety Net She Believed in Was Pulled Away When She Fell." (August 21, 2005). The *Wall Street Journal* similarly reported on December 3, 2005 that the ERISA statute "has evolved into one that covers far broader territory and can have an unanticipated effect, tilting the playing field in favor of employers and serving as a legal shield for them." Ellen Schultz, "A Hobbled Star Battles the NFL." Even the authoritative medical journals have concluded that "ERISA plans have a financial incentive to deny care...without liability, there is nothing in the law to counterbalance the financial incentive to deny care." Mariner, "What Recourse? – Liability for Managed-Care Decisions and the Employee Retirement Income Security Act," *New England Journal of Medicine* 343: 592, 595 (August 24, 2000).

Accordingly, the issues raised in this petition merit review. The importance of employee benefits claims and consistency in treatment of civil actions authorized by Congress mandates review by this Court. The absence of penalties and damages in the ERISA law means that meaningful court review is the only way to hold ERISA plan administrators accountable. The Seventh Circuit's ruling is an aberration, inconsistent with the ERISA statute, its legislative history, and rulings issued both by this Court and by the other Circuits.

CONCLUSION

For all of these reasons, Petitioner, Kathleen Semien, prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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